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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WALSH, Defendant and Appellant.	B290060, B291142 (Los Angeles County Super. Ct. No. MA070631)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Idan Ivri and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Walsh appeals from a judgment entered after a jury found him guilty of (1) driving under the influence (DUI) of alcohol causing great bodily injury, within 10 years of another DUI offense (Veh. Code, §§ 23153, subd. (a) & 23560), (2) driving with 0.08 percent blood alcohol content causing injury, within 10 years of another DUI offense (Veh. Code, §§ 23153, subd. (b) & 23560), (3) second degree murder (Pen. Code, § 187, subd. (a)), and (4) gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)). As to the two DUI offenses, the jury found true the special allegations that Walsh inflicted great bodily injury upon the victim (Pen. Code, § 12022.7, subd. (a)) and that he had two prior DUI convictions (Veh. Code, § 23152, subd. (b)). The trial court sentenced him to 21 years to life in prison.

In his appeal from the judgment (appellate case No. B290060), Walsh contends the trial court committed the following reversible errors: (1) denying his motion for new trial based on insufficiency of the evidence, (2) failing to instruct the jury properly on causation, gross vehicular manslaughter, and consideration of his prior DUI convictions, and (3) erroneously striking testimony from his accident reconstruction expert. Finding no error, we affirm the judgment.

In a consolidated appeal (appellate case No. B291142), Walsh challenges the restitution award to the surviving spouse of the deceased victim ($1,113,232.80). As explained below, the trial court did not abuse its discretion, and we affirm the order.

BACKGROUND

On February 14, 2017, at around 6:00 p.m., Walsh was driving his Ford F-250 pickup truck around a curve on the two-lane Angeles Forest Highway, when he crossed a double yellow

line and moved into oncoming traffic. His truck collided with a Volkswagen Beetle (or "bug"), traveling in the opposite direction. The Volkswagen's driver, Ross Diaz, died at the scene.[1] Walsh's truck also struck a Honda Accord that was driving behind the Volkswagen. Lisa Graham, the Honda's driver, sustained serious injuries in the collision.[2] Evidence presented at trial showed Walsh had a blood alcohol concentration level of 0.14 percent, more than one and a half times the legal limit, about two hours after the collision. There is no evidence either victim was under the influence of alcohol or drugs at the time of the collision.

The prosecution's theory at trial was that due to his intoxication, Walsh failed to negotiate the curve and crossed over the double yellow line, causing the collision and Diaz's death and Graham's injuries. Walsh's theory at trial was that the sole and superseding cause of the collision was the County of Los Angeles's (County) failure to post signs warning drivers to reduce their speed going into the curve. Based on his expert's testimony, he maintained that a pickup truck traveling at the posted speed limit (55 miles per hour) would lose traction with the road, fail to negotiate the curve, and lose control of his vehicle.

I. Prosecution Case

A. Testimony from eyewitnesses regarding the accident

Victim Graham and Ashley Sharp, a driver who was traveling behind Graham, both testified at trial that they (and

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[1] The cause of death was blunt head trauma.

[2] Her arm was broken in five places, and her wrist was "shattered." She underwent two arm surgeries. She also sustained a foot injury, requiring a future surgery.

Diaz) were driving between 30 and 35 miles per hour as they approached the curve where the collision occurred. Graham and Sharp both observed Walsh's pickup truck traveling in the opposite direction as it failed to negotiate the curve and drove into their lane. According to Graham, immediately before the collision, Diaz's Volkswagen was driving in its lane and did not cross into the oncoming lane where Walsh was driving.

B. Testimony from witnesses at the scene regarding Walsh's signs of intoxication

When Sharp approached Walsh and spoke with him to see if he was okay, she noticed an odor of beer emanating from his breath and his slow, slurred speech ("like he had marshmallows in his mouth as he was talking"). Based on her observations, she believed he was intoxicated.

Cesar Mercado was driving on Angeles Forest Highway and came upon the scene of the collision immediately after it occurred. He approached Walsh and spoke with him to see if he was okay. He smelled an odor of alcohol and observed Walsh's watery eyes and slurred speech. According to his trial testimony, Mercado asked Walsh, "Did you drink?" Walsh nodded his head affirmatively and "admitted that he had a few drinks."

California Highway Patrol Officer Stephen Taggart contacted Walsh at the scene, as paramedics were removing him from his truck and placing him in an ambulance. Taggart observed signs of intoxication: a strong odor of alcohol on Walsh's person and inside the ambulance after he was placed inside it; red, watery eyes; and slurred speech.

C. Sobriety and blood tests at the hospital

California Highway Patrol Officer Eduardo Alonzo contacted Walsh at the hospital in the emergency department.

During his 18 years as a California Highway Patrol Officer, Alonzo conducted more than 1,000 DUI investigations. He observed signs of alcohol intoxication on Walsh: bloodshot eyes, slurred speech, and an odor of alcohol. Accordingly, he conducted a DUI investigation.

Alonzo asked Walsh if he drank any alcohol prior to the collision. Walsh told him he had consumed four 12-ounce cans of Coors Light beer. Alonzo asked Walsh when he had started and stopped drinking. Walsh stated had had "no idea" when he started drinking and that he stopped drinking "before driving." Walsh told Alonzo he was driving to his home at the time of the collision.

Alonzo performed two field sobriety tests on Walsh. First, he conducted a horizontal gaze nystagmus eye examination, having Walsh follow the tip of a pencil with his eyes. Alonzo normally performed the test while the person was standing, but Walsh was lying down and wearing a neck brace due to the medical treatment he was receiving. Alonzo observed nystagmus—"involuntary jerking of the eyes"—at the "extremes" on both sides and "prior to the 45-degree angle." He also observed "the lack of smooth pursuit," meaning Walsh "was unable to smoothly track a moving stimulus." Based on the results, he believed Walsh was impaired.

At 7:49 p.m., Alonzo performed a preliminary alcohol screening test using a handheld device. He was only able to obtain one small breath sample from Walsh due to the nature of his injuries (including a fractured leg) and the treatment he was receiving. The device measured Walsh's blood alcohol concentration level at 0.157 percent.

After conducting his investigation, Alonzo believed Walsh was under the influence of alcohol. He arrested Walsh for a DUI and advised him of "implied consent"—that as a condition of his California driver's license, he had agreed "to submit to a chemical test of blood or breath when requested by a law enforcement officer if . . . believed to be under the influence." Walsh agreed to submit to a blood test. At 8:02 p.m., around two hours after the collision, a certified phlebotomist drew Walsh's blood in Alonzo's presence. The vial was sealed in an envelope and later booked into evidence and processed by the sheriff's department crime lab.

The crime lab analyzed Walsh's blood sample twice. The first analysis showed a blood alcohol concentration level of 0.136 percent. The second analysis showed a blood alcohol concentration level of 0.146 percent. Thus, the average of the two "runs" was 0.14 percent.

A senior criminalist from the sheriff's department crime lab opined at trial that "everyone is impaired to drive a vehicle safely once they've reached a 0.08 blood or breath alcohol concentration."

D. Officer Taggart's traffic collision investigation

Over 19 years, Officer Taggart conducted around 950 traffic collision investigations. He conducted the investigation in this case.

Based on his review of evidence at the scene, witness statements, and damage to the vehicles, Taggart "determined that Mr. Walsh was traveling south on Angeles Forest Highway. Mr. Diaz was traveling north on Angeles Forest Highway. They were both approaching a curve in the roadway. It was a right-hand curve for Mr. Walsh, a left-hand curve for Mr. Diaz. Ms.

Graham was traveling a few car lengths behind Mr. Diaz, also traveling north.

"Mr. Walsh allowed his truck to cross the center lines, the painted double yellow lines. After his truck was about two feet into the roadway [the northbound lane], he began to steer to the right. I know that because his left front tire deposited a tire friction mark, similar to a skid mark. We call it a tire friction mark because it was -- that mark was placed there due to him turning the vehicle, not necessarily applying the brakes.

"The vehicle continued traveling into the northbound lane. And when that left front tire was approximately six feet into the northbound lane, it collided with the Volkswagen Beetle. So the left front of the Ford [pickup truck] collided with the left front of the Beetle . . . .

"As a result of that collision, the F-250 [pickup truck] began to rotate or to spin in a counterclockwise direction. . . . When it impacted with the Volkswagen, it rotated . . . and began to travel almost sideways down the roadway, at which time the right front of the Ford collided with the front of the Honda Accord.

"At that impact, both vehicles rotated now in a clockwise direction, with the Ford coming to rest where it was on the shoulder and partly hanging over the embankment and the Honda blocking the northbound lane."

Taggart stated that crossing a double yellow line is a violation of the Vehicle Code. (Veh. Code, § 21460a.) He opined that the cause of the collision "was Mr. Walsh driving under the influence of alcohol, which caused him to fail to stay on his side of the road, cross the double yellow lines, enter the oncoming lane, and collide with Mr. Diaz's vehicle."

"Based on the friction of the roadway and diameter of [the] tire mark," Taggart estimated Walsh was driving 54 to 60 miles per hour "at the point where [his vehicle] physically left the mark on the ground." The speed limit for southbound traffic at that location was 55 miles per hour. Taggart also testified about the basic speed law (Veh. Code, § 22350), and explained the posted speed limit may not be a safe speed and may be a violation of the basic speed law, depending on roadway conditions.

According to Taggart the "critical speed," or "maximum speed that a vehicle can take [a] curve and drive in the center of [the] lane," was 68 miles per hour at the point where Walsh's truck began to cross the double yellow lines and move into the northbound lane. Where Walsh's truck collided with Diaz's car, the critical speed was 58 miles per hour, based on Taggart's calculation.

Taggart testified the road had signs warning that a curve was there, but there was "no posted advisory sign for a specific speed for that curve." In the six miles before the collision site, there were 37 curves and 13 of them had posted speed advisory signs.

Taggart further testified that from January 1, 2017 to December 31, 2017 there were 89 traffic collisions along an 18-mile stretch of Angeles Forest Highway. Three of those collisions occurred within six-tenths of a mile from the collision site in this case. There were no other collisions in 2017 at the particular curve where this collision occurred. On April 11, 2017, approximately 2,800 vehicles traveled south on Angeles Forest Highway in a 24-hour period.

E. Taggart's interviews with Walsh

Taggart interviewed Walsh three times over two days. The first interview occurred at the hospital, on February 15, 2017, the day after the collision. Taggart recorded the interview. Walsh stated at the time of the collision, he was driving home from Santa Clarita, after running some errands. He lived about 12 miles south of the collision site. For two months, he had been making the drive weekly. Walsh also told Taggart before he left home in the morning, he drank two or three 12-ounce cans of beer. After running his errands, he stopped at a bar in Santa Clarita around 2:00 p.m. and drank another beer. He left the bar and headed home at around 3:30 p.m.[3] Walsh stated he did not remember crossing the double yellow line prior to the collision. He assumed "the other party" crossed the line. He estimated he was driving 35 miles per hour at the time of the collision. He had owned the pickup truck involved in the collision for two and a half to three years. He normally drove it, and it did not have any mechanical problems prior to the collision.

During the same interview, Taggart asked Walsh whether he had any prior DUI arrests or convictions, knowing Walsh had two prior DUI convictions from 2010 and 2011. Walsh did not disclose those convictions. He stated he had been arrested for a DUI 20 years before. Taggart asked whether Walsh was required to attend DUI classes as a result of his arrest 20 years before. Walsh responded affirmatively and stated he had attended

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[3] Using 3:30 p.m. as the time Walsh stopped drinking, and knowing that his blood draw at 8:02 p.m. showed a blood alcohol concentration level of 0.14 percent, a criminalist from the crime lab calculated Walsh's blood concentration level at the time of the collision (6:00 p.m.) at between 0.14 and 0.18 percent.

classes where he was informed about the potential that DUI could result in someone being killed.

The following day, on February 16, 2017, Taggart interviewed Walsh twice because the first interview was interrupted when Walsh received a telephone call. During these interviews, Walsh told Taggart he "always drives with two hands on the wheel and one eye on his mirrors." Taggart asked Walsh if he believed he was over the legal alcohol limit of 0.08 percent at the time of the collision. Walsh responded that he believed he was probably over the legal limit because he had consumed four beers in an hour and a half. He stated he did not feel the effects of the alcohol and "felt fine to drive."

F. Walsh's prior DUI convictions and classes

The prosecution presented certified documents showing Walsh had five prior DUI convictions, three in Ventura County and two in Los Angeles County, dating from 1989 to 2011.

The prosecution also presented evidence indicating Walsh participated in a DUI education program at least three times, including a six-month program and an 18-month program. The six-month program occurred in 2010. The programs included instruction about the dangers of drinking and driving. As part of the programs, Walsh signed a *Watson* advisement, warning him that drinking and driving could result in someone being killed and him being charged with vehicular manslaughter or murder.

II. Defense Case

Babak Malek, a forensic scientist employed by the Institute of Risk and Safety Analysis, specializing in accident reconstruction, mechanical analysis, and human factors analysis, testified as Walsh's expert. He went to the scene of the collision twice and reviewed reports and documents depicting the scene.

Using the "yaw mark" at the collision scene—a mark "created when a rotating tire slides or slips parallel to its axis"—Malek calculated the speed of Walsh's truck at the time of the collision as between 54.7 and 58.7 miles per hour. As set forth above, the speed limit at the collision site was 55 miles per hour.

At the point where the collision occurred, Malek calculated the critical speed—the maximum speed at which a vehicle can take a curve and maintain friction with the road—as 56.7 miles per hour. He opined a vehicle traveling at the posted speed limit of 55 miles per hour at the point where the collision occurred would lose friction with the road and be at risk of losing control of the vehicle.[4]

Malek acknowledged there was signage prior to the collision site warning of the curve. He testified, however, that the signage "does not address the critical issue here of the speed that needs to be reduced for this curve." He also acknowledged there was a speed warning sign 800 feet before the curve, but opined a speed warning sign should have been posted 200 feet before the curve to provide sufficient warning. According to Malek, the speed warning sign for this curve should have been 45 miles per hour, about 10 miles per hour below the critical speed.

Based on a hypothetical mirroring of the facts of this case, Malek opined the cause of the collision was loss of friction with the road because the driver took the curve at or near the critical speed (and the speed limit) due to the County's failure to warn

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[4] As set forth above, Officer Taggart testified that Walsh's pickup truck began to cross over the double yellow line at a point before the collision site, where the critical speed was 68 miles per hour.

the driver to reduce his speed to 10 miles per hour under the critical speed.

DISCUSSION

I. Appeal No. B290060

A. Sufficiency of the evidence

Walsh contends there was insufficient evidence he caused Diaz's death or Graham's injuries because "the accident was caused by a supervening event, that is, the negligent failure of the [C]ounty of Los Angeles to post signs warning drivers to reduce speed heading into the curve at which the accident occurred." He maintains there was no evidence "that any malfeasance caused him to lose traction, given that even a completely sober driver under similar circumstances may be expected to lose traction on that curve." (Italics omitted.) Moreover, he asserts the evidence he was under the influence at the time of the collision "was so compromised by failure to follow established protocols, that it could not be considered 'substantial . . . credible . . . [and of] solid value.' "[5]

"In reviewing the sufficiency of the evidence, we must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the

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[5] Walsh points to evidence that Officer Alonzo conducted the horizontal gaze nystagmus examination while Walsh was lying down and wearing a neck brace (instead of standing), and evidence that the phlebotomist and a criminalist did not know the whereabouts of Walsh's blood sample between the time it was drawn at the hospital, on February 14, 2017, and the time it was analyzed at the crime lab two days later, on February 16, 2017.

defendant guilty beyond a reasonable doubt.' [Citation.] It is the jury, not an appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] The appellate court may not substitute its judgment for that of the jury or reverse the judgment merely because the evidence might also support a contrary finding." (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 681.)

Viewing the evidence in a light most favorable to the judgment, as we must, Walsh's argument there was insufficient evidence he caused Diaz's death or Graham's injuries lacks merit. Walsh drank alcohol, then climbed behind the wheel of his pickup truck, knowing he was probably over the legal limit. He knew the road was curvy, as he had driven the same route in the same truck several times over the past two months. He began to cross the double yellow lines and move into oncoming traffic at a point where the critical speed was 68 miles per hour, according to Officer Taggart, around 10 miles faster than the speed he was traveling. This indicates loss of friction was not a factor, and he crossed the double yellow line because he was driving under the influence. There is no evidence indicating his blood sample was contaminated or improperly preserved. Everyone who came into contact with him that night believed he was intoxicated, consistent with the blood test results and the field sobriety tests. Substantial evidence demonstrates Walsh caused the collision and there was no superseding cause.

B. Denial of motion for new trial

Walsh contends the trial court abused its discretion in denying his motion for new trial based on insufficiency of the evidence because (1) the court did not review the evidence

independently and (2) the court disregarded his defense of lack of causation.

We review a trial court's ruling on a motion for new trial for abuse of discretion. Such a ruling " ' "is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." ' " (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) A trial court abuses its discretion in ruling on a motion for new trial if it bases "its decision on impermissible factors [citation] or on an incorrect legal standard [citations]." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

In ruling on a motion for new trial made on the ground that the verdict is contrary to the evidence under Penal Code section 1181, subdivision (6), "the trial court's function is to 'see that the jury intelligently and justly perform[ed] its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.' [Citation.] The trial court's duty is to review the evidence independently and satisfy itself that the evidence as a whole is sufficient to sustain the verdict." (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251.) The "presumption that the verdict is correct does not affect the trial court's duty to give the defendant the benefit of its independent determination as to the probative value of the evidence." (*Id.* at p. 1252.)

At the hearing on Walsh's new trial motion, the trial court noted it found the prosecution's evidence to be "extremely overwhelming," indicating it independently reviewed the evidence.

In support of his assertion, "the trial court failed to carry out this obligation," Walsh cites the following comment the court

made later in the hearing: "With regard to the weighing of the evidence, I believe that the jurors weighed the evidence appropriately." The court's comment does not indicate it deferred to the jury on the question whether the evidence was sufficient to sustain the verdicts and failed to independently review the evidence. Rather, the court's comment indicates it reached the same conclusion as the jury—that Walsh was guilty of the offenses.

Walsh further argues the trial court abused its discretion in ruling on his new trial motion because it "afforded no weight as a matter of law to [his] defense of lack of causation at trial." (Italics omitted.) He cites the court's comments at the hearing that the defense theory of the case "is something to the effect of the warning signs, that this is the fault of warning signs and not the fault of the defendant. [¶] This is not a civil case. This has nothing to do with the warning signs, and if you want to put that argument up in a civil case, that is entirely up to you. That had no bearing in this case. I don't believe that there was any viability for that argument whatsoever." The court did not abuse its discretion in finding the evidence demonstrated Walsh's actions caused the collision and in declining to credit Walsh's defense that the County's negligence was the sole and superseding cause of the collision.

C. Jury instructions

1. Causation

Walsh contends the trial court's instructions on causation (as an element of the murder and manslaughter charges) "were inaccurate and incomplete" because they did not "explicitly advis[e] the jury that *if* the negligence of the County was an intervening cause of death and was not foreseeable, and the

victim would not have died but for the intervening cause [citation], then [the jury] could conclude that [Walsh]'s act was not a 'substantial factor' in the victim's death."[6]

Using CALCRIM No. 240, the trial court instructed the jury, in pertinent part:

"An act or omission causes injury if the injury is the direct, natural, and probable consequence of the act or omission and the injury would not have happened without the act or omission. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence."

Using both CALCRIM No. 240 and subsequently CALCRIM No. 620, the trial court instructed the jury, in pertinent part:

"There may be more than one cause of injury [or death]. An act or omission causes injury [or death], only if it is a substantial factor in causing the injury [or death]. A substantial factor is more than a trivial or remote factor. However, it does not have to be the only factor that causes the injury [or death]."[7]

The remainder of CALCRIM No. 620, as read to the jury, states:

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[6] The Attorney General argues Walsh forfeited his contention by failing to request an additional causation instruction below. Walsh argues his trial counsel rendered ineffective assistance in failing to request an additional instruction. Accordingly, we review Walsh's contention on the merits.

[7] As read to the jury, CALRCIM No. 240 included the word "injury," and CALCRIM No. 620 included the word "death."

"The failure of a third party or another person to use reasonable care may have contributed to the death. But if the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death even though a third party or another person may have failed to use reasonable care.

"If you have a reasonable doubt whether the defendant's act caused the death, you must find him not guilty."

Here, the trial court properly instructed the jury on an intervening cause that relieves a defendant of criminal liability, or "an exonerating, superseding cause," which is an unforeseeable, "extraordinary and abnormal occurrence." (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.) As the Court of Appeal stated in *People v. Elder* (2017) 11 Cal.App.5th 123, the "direct, natural, and probable consequence" language the court gave in this case (quoted above) explains sole or superseding causation. (*Id*. at pp. 136-137 ["the trial court was not required to give [the defendant's proposed instruction] because the jury was already adequately instructed on superseding causation" where the court instructed the jury "that defendant could be found guilty only if the death or injury was the natural and probable consequence of his conduct, meaning that nothing unusual intervened"].) As stated in the instructions given in this case, if something unusual intervened—a superseding cause—the defendant's act did not cause the injury or death.

The trial court properly instructed the jury on causation.

2. Gross vehicular manslaughter

Walsh contends the trial court's instruction on gross vehicular manslaughter while intoxicated allowed the jury to find him guilty of the offense if the jury believed he lost control of his

vehicle, regardless of whether the loss of control was a result of his actions or caused solely by the County's negligence in failing to post adequate warning signs. He argues the instruction therefore "foreclosed consideration" of his defense that the County's negligence caused the collision.

"Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence." (Pen. Code, § 191.5, subd. (a).) " 'Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. . . . The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved.' " (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1171.)

The trial court instructed the jury using CALCRIM No. 590, stating in pertinent part:

"To prove that the defendant is guilty of this crime [gross vehicular manslaughter], the People must prove that:

"1. The defendant drove under the influence of alcohol or drove while having a blood alcohol level of .08 or higher.

"2. While driving that vehicle under the influence of alcohol, the defendant also committed an infraction or otherwise lawful act that might cause death;

"3. The defendant committed the infraction or otherwise lawful act that might cause death with gross negligence;

"AND

"4. The defendant's grossly negligent conduct caused the death of another person."

As part of this instruction, the court also informed the jury the People alleged Walsh committed the following infractions: violation of the basic speed law (Veh. Code, § 22350) and crossing double yellow parallel lines (Veh. Code, § 21460a). In explaining the "otherwise lawful act that might cause death" portion of element 2, the court included the following language that neither the prosecution nor the defense requested and to which the defense objected: "The People also allege that the defendant committed the following otherwise lawful act that might cause death: duty to exercise ordinary care at all times and to maintain proper control of the vehicle." The court further informed the jury: "Using ordinary care means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation."[8]

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[8] An act constituting ordinary negligence satisfies the second element of the offense, that "[w]hile driving the vehicle under the influence of alcohol, the defendant also committed an infraction or otherwise lawful act that might cause death." (CALCRIM No. 591.) However, an infraction or "commission of a negligent act or omission in the driving of a motor vehicle while intoxicated will not support a conviction of gross vehicular manslaughter *unless* the circumstances of the defendant's intoxication or the manner in which he drove evidences gross negligence—not mere inadvertence—but a conscious disregard of

We disagree with Walsh's interpretation of the challenged portion of the instruction—that it allowed the jury to find him guilty of gross vehicular manslaughter while intoxicated if the jury merely found he lost control of the vehicle, regardless of whether the jury believed his actions caused him to lose control of the vehicle or the County's negligent failure to post warning signs was solely responsible for the loss of control of the vehicle. Considering the instructions as a whole, as we must (*People v. Wallace* (2008) 44 Cal.4th 1032, 1075), and not considering in isolation only the challenged portion of the instruction, we conclude Walsh's interpretation of the instruction is unreasonable. The instruction clearly states the jury could not find Walsh guilty of the offense unless it found beyond a reasonable doubt (1) he drove under the influence, (2) he committed one of the enumerated infractions, or failed to exercise ordinary care, (3) he committed the act with gross negligence, and (4) his grossly negligent conduct caused the victim's death. To the extent he lost control of the vehicle through no fault of his own—without engaging in grossly negligent conduct—the plain language of the instruction did not permit the jury to find him guilty of the offense.

The trial court did not err in instructing the jury on gross vehicular manslaughter while intoxicated.

3. Prior DUI convictions

Walsh contends the trial court erred in instructing the jury it could consider evidence of his prior DUI convictions for the purpose of deciding whether his "alleged acts were not the result of mistake or accident."

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the consequences." (*People v. Hansen* (1992) 10 Cal.App.4th 1065, 1078.)

Using CALCRIM No. 375, the trial court instructed the jury, in pertinent part:

"The People presented evidence that the defendant committed other offenses that were not charged in this case, that the defendant was previously convicted of driving under the influence in Los Angeles County. The People also presented other acts or behavior by the defendant that was not charged in this case that included that the defendant was charged with driving under the influence of alcohol in prior cases from Ventura County.

"[¶] . . . [¶]

"If you decide that the defendant committed the uncharged offenses and or acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether:

"The defendant had knowledge to commit the offense as alleged in this case.

"*The defendant's alleged actions were not the result of mistake or accident*.

"[¶] . . . [¶]" (Italics added.)

Walsh objected to the italicized portion of the instruction (on grounds not specified), and the trial court overruled the objection. On appeal, Walsh contends the trial court erred in giving the italicized portion of the instruction because he did not assert a defense of accident or mistake at trial. He does not argue the trial court erred in admitting evidence of his prior DUI's.

The trial court did not err in including the italicized portion of the instruction because substantial evidence demonstrates the collision was not the result of accidental conduct on Walsh's part: he knowingly drove drunk and failed to properly control his

vehicle due to his intoxication. Moreover, his theory of the case was that the collision was an "accident" caused by the County's failure to post adequate warning signs.

Even if the challenged portion of the instruction was extraneous, Walsh was not prejudiced under state law or federal constitutional standards. His speculation that "perhaps the jurors or some of them concluded from the giving of the [challenged portion of the] instruction that [his] DUI priors somehow made the county less negligent in failing to post warning signs" is unreasonable. The challenged portion of the instruction relates to Walsh's actions, not the County's actions. It had no impact on his defense that he was blameless and the collision was caused by the County's negligence in failing to post adequate warning signs.

D. Stricken testimony from Walsh's accident reconstruction expert

Walsh contends "the judgment must be reversed in its entirety" because the trial court struck testimony from Walsh's accident reconstruction expert.

During direct examination, defense counsel asked Malek to explain "what a radius is." Malek answered in the form of a lengthy narrative, which the trial court stopped after Malek testified, "The person who is traveling 50 miles an hour or slightly above, let's say 58 miles an hour, would be subject to a scenario where his vehicle would lose traction *which happened in this scenario*." (Italics added.) The court interjected, "The court is going to sustain its own objection." [¶] Counsel approach. [¶] Answer stricken."

At sidebar, the trial court told defense counsel, "I can't permit him to continue to go on and talk about this case

specifically because that is appealable error." After the discussion with counsel concluded, the court informed the jury, "The witness's answer is stricken." Defense counsel continued direct examination, asking Malek questions about a hypothetical situation and not this case specifically.

Walsh argues that by interposing its own objection and striking the answer to this question, the trial court "eliminated [his] defense from the jury's consideration" and "excluded the defense expert's ultimate conclusion." Walsh's interpretation of the record is unreasonable. In response to questions about a hypothetical situation mirroring the facts of this case, Malek testified that the cause of the collision was loss of friction; that a vehicle traveling at the speed limit of 55 miles per hour would lose friction at the curve where the collision occurred; and that there should have been a sign warning drivers to reduce their speed to 45 miles per hour on the curve. Walsh's claim that the court "eviscerated [his] defense" by objecting to and striking Malek's answer to a question is disingenuous and without merit.[9]

II. Appeal No. B291142

Walsh contends the trial court erred in calculating the restitution award, and the award "violates constitutional proscriptions against excessive fines and cruel and unusual punishments."

A. Proceedings below

The prosecution moved the trial court for an order awarding Mr. Diaz's widow his past and future lost wages in the amount of $1,113,232.80. The prosecution attached to the motion

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[9] Walsh also contends we must reverse his convictions based on cumulative error. We have found no error to cumulate.

an employment verification form from Mr. Diaz's employer, the Los Angeles County Department of Human Resources, stating Mr. Diaz was a Deputy Compliance Officer, who was employed by the County from November 22, 1991 to the time of his death on February 14, 2017, earning a semi-monthly gross salary of $4,877.69 and a semi-monthly net salary of $2,929.56. The prosecution also submitted Mr. Diaz's 2016 Form W-2, Wage and Tax Statement, which lists wages consistent with the salary stated on the employment verification form.

Mr. Diaz was 48 years old when he died. It is undisputed he was the sole provider for his wife and four children (two of whom were in college and two of whom were minors). The prosecution alleged in the motion that Mr. Diaz "had planned on working for an additional 15 years before retirement."

The prosecution calculated the requested restitution "by multiplying Mr. Diaz's annual net salary ($70,309.44) by 15 (for the additional years he was planning on working) for a total of $1,054,641.60, and then adding the net salary he would have earned in the year 2017 for the months March through December had he not been killed ($58,591.20)."

At the hearing on the restitution motion, defense counsel argued, "There are not sufficient facts supporting the restitution, and we believe the calculation is improper." The trial court asked the defense for its calculation, and defense counsel responded, "we are disputing the future earnings based on 15 years I believe they have calculated." The court asked the defense, "is there any statutory or case law reference that you have, [defense counsel], that makes reference to we cannot give [*sic*] restitution for future losses?" Defense counsel replied, "No, I don't have anything."

Defense counsel made no further objection to or argument against the requested restitution award.

The trial court stated that the prosecution's restitution calculation was permitted by *People v. Giordano* (2007) 42 Cal.4th 644 (*Giordano*), a case cited in the prosecution's motion and by the prosecutor at the hearing. The court issued an order awarding restitution in the amount requested by the prosecution.

B. Legal standards

The California Constitution provides: "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." (Cal. Const., art. I, § 28, subd. (b)(13)(B).) Penal Code section 1202.4, which implemented this constitutional mandate, provides in pertinent part: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (Pen. Code, § 1202.4, subd. (f); *People v. Millard* (2009) 175 Cal.App.4th 7, 24-25 (*Millard*).) "[S]ection 1202.4 does not itself provide guidelines for calculating the economic loss that a surviving spouse incurs." (*Giordano*, *supra*, 42 Cal.4th at p. 664.)

"At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] 'Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.' " (*Millard*,

supra, 175 Cal.App.4th at p. 26.) The standard of proof is a preponderance of the evidence. (*Ibid*.)

We review a trial court's restitution award for abuse of discretion. "Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss." (*Giordano*, *supra*, 42 Cal.4th at pp. 663-664.) " 'There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action.' " (*Millard*, *supra*, 175 Cal.App.4th at pp. 26-27.) "Generally, the calculation of the loss of support may be informed by such factors as the earning history of the deceased spouse, the age of the survivor and decedent, and the degree to which the decedent's income provided support to the survivor's household. These guideposts are not provided as an exhaustive list. Naturally the court's discretion will be guided by the particular factors at play in each individual claim." (*Giordano*, at p. 665.)

Courts have upheld restitution awards calculated by multiplying gross salary by the number of years until projected retirement. (*Millard*, *supra*, 175 Cal.App.4th at pp. 29-30; see *Giordano*, *supra*, 42 Cal.4th at p. 666 ["The trial court awarded restitution based on a period of five years, but, as defendant's counsel indicated, decedent was relatively young when he was killed and the court could have calculated loss of support using a longer period of time"].)

C. Analysis

Walsh contends the trial court abused its discretion in adopting the prosecution's calculation of the restitution award because "there was *no* evidence of the victim's stated intent to work another fifteen years, which was the sole basis for the prosecutor's projection of future earnings using the victim's monthly income." Walsh notes in *Millard*, *supra*, 175 Cal.App.4th 7, the injured accident victim testified at the restitution hearing that, at the time of the accident, he "expected to continue [working in the construction] industry until his retirement had it not been for the [motorcycle-car] accident." (*Id.* at p. 29.) Here, Mr. Diaz was deceased and could not testify at the restitution hearing about his future lost earnings. The calculation the prosecution employed and the court adopted, using a retirement age of 63, is "a method that is rationally designed to determine the surviving victim's economic loss." (*Giordano*, *supra*, 42 Cal.4th at pp. 663-664.) In *Millard*, the prosecution based its calculation on an assumption the victim would have retired sometime between 65 and 67 years old, later than the assumption made in this case. (*Millard*, at p. 29.)

Walsh also argues the trial court abused its discretion in making the restitution award because "no allowance was made for the fact that some of [Walsh]'s income, had he survived, would have gone to his own expenses as opposed to those of his wife; and, based on the record, would at some point have gone to the support of *grown* children (for whom Ms. Diaz presumably would not be financially responsible)." As discussed above, the restitution order need not be exact, only "rationally designed to determine the surviving victim's economic loss." (*Giordano*, *supra*, 42 Cal.4th at pp. 663-664; *Millard*, *supra*, 175 Cal.App.4th at pp. 26-27.) By using Mr. Diaz's net salary instead of gross, the

prosecution already discounted the amount. The trial court did not abuse its broad discretion to fashion a restitution award.

Walsh's final argument against the restitution award is that it "violates constitutional proscriptions against excessive fines and cruel and unusual punishments." Walsh forfeited this claim by failing to object on this basis below. (*People v. Gamache* (2010) 48 Cal.4th 347, 403; *People v. Burgener* (2003) 29 Cal.4th 833, 886.) But even if he had objected, the claim lacks merit. Walsh has cited no authority, and we are aware of none, holding constitutional proscriptions against excessive fines and cruel and unusual punishments apply to a restitution award calculated from a method rationally designed to determine a surviving victim's economic loss.

DISPOSITION

The judgment and order are affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J. WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.